STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2014
v	No. 315720 Ionia Circuit Court
JOSEPH MAXWELL LANOUE, Defendant-Appellant.	LC No. 2012-015489-FH

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant Joseph Maxwell Lanoue appeals by right his jury conviction for assault of a prison employee. MCL 750.197c(1). The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to serve 50 to 120 months in prison. Because we conclude there were no errors warranting relief, we affirm Lanoue's conviction. However, for the reasons more fully explained below, we remand for resentencing.

In March 2011, Lanoue was incarcerated in the segregation unit of Bellamy Creek Correctional facility in Ionia, Michigan. Corrections officers Randy Wickwire and Mark Kalanquin were on duty that day and were escorting Lanoue and other prisoners to the showers. Wickwire testified that he and Kalanquin removed Lanoue from his cell, performed a quick pat down search of his outer clothing, and escorted him to the shower before attending to other prisoners. After they returned to Lanoue's shower, Wickwire was hit in the hands and chest with a "yellow liquid." Lanoue began to laugh and stated, "I just threw piss on you." Wickwire saw Lanoue holding a plastic juice bag, which the inmates receive with their daily meals, in his hands. As he was escorted from the showers, Lanoue announced to everyone that he had just thrown urine on Wickwire. When Detective Sergeant Michael Morey of the Michigan State Police subsequently interviewed him, Lanoue admitted that he urinated into a plastic juice bag and used it to assault Wickwire.

Lanoue first argues that the police officers and prosecution violated his due process rights by suppressing or failing to preserve the juice bag, the names of the other prisoners who were present in the shower area, and Wickwire's shirt. He also claims that his trial lawyer's failure to move for dismissal on that basis or, at the least, to request an adverse inference instruction amounted to ineffective assistance. We review unpreserved claims of error, such as these, for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendants have a due process right to access the evidence against them. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). Thus, the prosecution's deliberate or inadvertent suppression of material evidence that is favorable to the accused violates due process. *People v Chenault*, 495 Mich 142, 149-150; 845 NW2d 731 (2014), citing *Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999). Likewise, the government's failure to preserve potentially exculpatory evidence may violate a defendant's due process rights. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 281 (1988). However, to prevail on a failure to preserve claim, Lanoue must show that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith in failing to preserve it. *People v Heft*, 299 Mich App 69, 79; 829 NW2d 266 (2012).

It is not clear what happened to the juice bag that was apparently used in the assault, but Morey testified that it was never given to him and was likely discarded because they generally do not keep urine and feces in cases such as this. The government has an obligation to disclose evidence that it has in its possession; it does not, however, have an obligation to disclose evidence that it does not possess. *Anstey*, 476 Mich at 460-461. And there is no indication that the officers discarded the juice bag in bad faith or even that the juice bag would have been exculpatory. *Heft*, 299 Mich App at 79.

With respect to the potential additional witnesses, there is evidence that there were two other inmates present in the shower area when the assault occurred, but Wickwire could not recall who they were and Kalanquin stated that the records do not show which inmates shower at what times. Morey further stated that he did not recall being told that there were two other inmates present. Thus, he did not interview any prisoners other than Lanoue. Because the prosecution did not have any evidence concerning these potential witnesses, it had no obligation to provide Lanoue's lawyer with anything concerning these witnesses. We also reject Lanoue's contention that the officers or prosecution had an affirmative duty to conduct further investigations to determine whether other witnesses were present, and if so, to identify and interview them. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 ("Neither the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case."); *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991) ("The prosecutor's office is not required to undertake discovery on behalf of a defendant."). Because the prosecution has no duty to develop evidence on a defendant's behalf, the prosecution's failure to investigate and interview potential witnesses does not implicate *Youngblood*. See *Anstey*, 476 Mich at 461.

Similarly, with respect to Wickwire's shirt, the record lists the shirt as having been admitted at trial and Lanoue's claim that the government should have tested the shirt for fingerprints and DNA is meritless because, again, the prosecution had no duty to develop evidence on Lanoue's behalf. *Id.* Lanoue could have requested testing had he wished. See MCR 6.201(A)(6).

In any event, none of the evidence at issue had exculpatory value. Lanoue asserts that the juice bag could have been tested for fingerprints and could have been tested to determine if it was urine, and, if so, whose it was. He also maintains that the shirt could have been tested for DNA and speculates that the missing inmates could have provided impeachment testimony. However, Lanoue admitted to throwing the bag at Wickwire, and thus, a fingerprint analysis would not have produced exculpatory evidence. In addition, the nature of the substance in the

juice bag was irrelevant. Lanoue would have been guilty of assault whether the bag contained urine, water, or some other substance. Finally, Lanoue has not proffered any evidence concerning the proposed testimony from the witnesses who allegedly witnessed the attack. As such, Lanoue has not demonstrated plain error. *Carines*, 460 Mich at 763.

For similar reasons, Lanoue has not demonstrated that his trial lawyer was ineffective. In order to establish a claim of ineffective assistance, the defendant must identify an act or omission by his lawyer that he believes was not the result of reasonable professional judgment—that is, an act or omission that fell below an objective standard of reasonableness under prevailing professional norms. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864. He must then show that there is a reasonable probability that, but for the act or omission, the result of the proceeding would have been different. *Id.*

Lanoue cannot establish that his lawyer's performance was deficient because neither a motion for dismissal based on a violation of due process nor a request for an adverse inference instruction would have been successful. As noted above, the government did not have a duty to develop or disclose the evidence at issue and, with regard to the bag, there was no evidence that the government acted in bad faith. Therefore, Lanoue's lawyer could not have established grounds for dismissal. Likewise, an adverse inference instruction is only applicable where the prosecutor acted in bad faith in failing to produce the evidence and not where the evidence did not exist or could not be located. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993), overruled on other gds *People v Grissom*, 492 Mich 296, 319-320; 821 NW2d 50 (2012). Lanoue's lawyer cannot be faulted for failing to advance a meritless position or make a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Lanoue next argues that he was denied his right to due process by an approximately 11-month pre-arrest delay, and that his trial counsel was ineffective for failing to move for dismissal on this ground. We review this unpreserved claim for plain error. *Carines*, 460 Mich at 763.

The mere delay between the time of the commission of the offense and arrest does not give rise to a due process violation absent a showing of "actual and substantial prejudice" and an intent by the prosecution to gain a tactical advantage. *People v Patton*, 285 Mich App 229, 236-237; 775 NW2d 610 (2009). Lanoue has presented no evidence that the prosecution tried to gain a tactical advantage by the delay. Moreover, his claim of prejudice is limited to arguing that he was unable to test the juice bag and unable to locate the missing witnesses. However, the juice bag was never turned over to the investigating officers or prosecution, but was likely discarded immediately after the assault. Thus, Lanoue cannot establish that the delay affected his ability to develop this evidence. Further, as we already noted, Lanoue has not demonstrated how the juice bag—or its contents—or the testimony of unknown witnesses would have supported his defense. As such, he has not established actual and substantial prejudice. *Id.* at 237. There was no plain error and Lanoue's lawyer cannot be faulted for failing to move for dismissal on this ground. *Fonville*, 291 Mich App at 384.

Lanoue also argues that he was denied his constitutional right to a speedy trial and that his trial counsel was ineffective for failing to move for dismissal on this ground. We review constitutional questions de novo. *Patton*, 285 Mich App at 236.

"The United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial." *Id.* at 235 n 4, citing US Const Am VI and Const 1965, art 1, § 20. In determining whether a defendant has been denied the right to a speedy trial, we consider and balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Id.* Prejudice is presumed if the delay is over 18 months, but if the delay is less than 18 months, the defendant must demonstrate prejudice. *Id.*

As to the first factor—length of the delay—the record does not clearly indicate when Lanoue was formally arrested, although we note that the felony warrant was authorized in February 2012 and his lawyer entered his appearance in a document filed with the trial court at the end of that same month. Lanoue was then arraigned in March 2012 and again in September 2012. The trial court held the trial in January 2013. Thus, the total delay between arrest and trial was approximately 11 months. Accordingly, there is no presumption of prejudice. *Id.*

The second factor—the reason for delay—weighs against Lanoue. The record shows that Lanoue requested a competency examination after his arraignment in March 2012, which the trial court granted. The trial court held a competency hearing in August 2012 and found he was competent to stand trial. The time needed to adjudicate defense motions is charged to the defendant. *People v Gilmore*, 222 Mich App 442, 461; 564 NW2d 158 (1997). Thus, the approximately five months it took to adjudicate Lanoue's competency is attributed to him. We note that there could have been other reasons for delay in that time period, such as trial court congestion or periods of inactivity on the part of the prosecution, but Lanoue makes no such assertions on appeal. Further, we note that trial in this matter was originally set for December 2012, but Lanoue stipulated to adjourn trial to accommodate a witness.

The third factor does not weigh against Lanoue because he asserted his right to a speedy trial in February 2012—even though he did not move for dismissal on this ground.

Finally, Lanoue has not demonstrated any prejudice. There are two types of prejudice: prejudice to the defendant personally, such as where the defendant is incarcerated pending trial, and prejudice to the defense, such as where the delay leads to the inability to find witnesses and the fading of witnesses' memories. *Gilmore*, 222 Mich App at 461-462. Lanoue has not asserted personal prejudice, and we note that he was already incarcerated. Moreover, he has not identified how any delay affected his ability to present a defense. Accordingly, Lanoue was not denied his right to a speedy trial and his trial lawyer cannot be faulted for failing to make a futile motion to dismiss on that basis. *Fonville*, 291 Mich App at 384.

Lanoue next argues that he was denied due process and the right to compulsory process by the prosecution's failure to identify the inmates who were present during the assault and produce them at trial, and that his trial counsel was ineffective for failing to request an adverse witness instruction. Although Lanoue frames this issue as a constitutional claim, he provides no substantive argument in support of a due process or compulsory process violation. Rather, the

context of his argument is merely that he was entitled to a jury instruction on missing witnesses. Thus, we consider his constitutional claims abandoned and review this claim as one involving instructional error. Because Lanoue failed to request a missing witness instruction at trial, we review it for plain error. *Carines*, 460 Mich at 763.

MCL 767.40a governs the prosecution's duty with regard to witnesses. In *People v Cook*, 266 Mich App 290, 294-295; 702 NW2d 613 (2005), we observed:

> Before it was amended in 1986, MCL 767.40a was interpreted to require the prosecution to locate, list, and produce at trial all persons, known or unknown, who might be res gestae witnesses. See *People v Burwick*, 450 Mich 281, 287-290; 537 NW2d 813 (1995). . . . However, after the 1986 amendment of MCL 767.40a, our Supreme Court held that the Legislature "eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be res gestae witnesses . . . ." *Burwick*, [450 Mich at 289]; see also *People v Perez*, 469 Mich 415; 670 NW2d 655 (2003). Instead, the prosecution must notify a defendant of all *known* res gestae witnesses and all witnesses that the prosecution *intends to produce*. *Burwick*, [450 Mich at 289.] "The prosecutor's duty to produce witnesses has been replaced with an obligation to provide notice of *known witnesses* and *reasonable assistance* to locate witnesses *on defendant's request*." *Id.* (emphasis added).

As the above passage makes clear, the prosecution no longer has a duty to locate, list, and produce all res gestae witnesses, known or unknown; rather, the prosecution's duty is to provide notice of known witnesses and to give reasonable assistance to the defense counsel in locating witnesses on defendant's request. *Id*. at 294-295; MCL 767.40a. There is no indication in the record that the officers or prosecution knew of the existence, let alone the identity, of any other res gestae witnesses. Thus, the prosecution was not required to "locate, list, [or] produce" those unknown witnesses. *Cook*, 266 Mich App at 294-295. Moreover, there is no evidence in the record that Lanoue requested assistance, in writing or otherwise, in locating those unknown witnesses, as required under MCL 767.40a(5). Consequently, the prosecution had no duty to provide such assistance. There was no violation of MCL 767.40a and Lanoue was not entitled to a missing witness instruction. For the same reason, Lanoue's lawyer was not ineffective for failing to make a futile request. *Fonville*, 291 Mich App at 384.

Lanoue also argues that his Fifth and Fourteenth Amendment rights were violated by the admission at trial of statements he gave to Morey during a custodial interrogation without having been advised of his rights, and that his trial counsel was ineffective for moving to suppress those statements. We review this unpreserved issue for plain error. *Carines*, 460 Mich at 763.

A criminal defendant has a right against self-incrimination. *People v White*, 493 Mich 187, 193-194; 828 NW2d 329 (2013). In order to protect that right, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards[.]" *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 694 (1966). The procedural safeguards include warning the defendant that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or

appointed." *Id*. "*Miranda* warnings are required when a person is interrogated by police while in custody or otherwise deprived of freedom of action in any significant manner." *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

The record indicates that Morey interviewed Lanoue at Bellamy Creek alongside a United States Secret Service agent, who was present to question Lanoue about an unrelated matter. The Secret Service agent, not Morey, read defendant his rights, after which he questioned Lanoue. Morey subsequently questioned Lanoue about this case, but did not readvise him of his rights. Lanoue contends that Morey's failure to readvise him of his rights rendered the latter statements inadmissible. Nothing shows that the questioning was separated in time and there is no authority for the proposition that Morey had an obligation to readvise Lanoue of his rights simply because he was going to question him about a different case. "[T]he *Miranda* rights are not a liturgy which must be read each time a defendant is questioned." *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986). Lanoue was advised of and waived his rights. Moreover, the record clearly supports that his statements to Morey were voluntary; he even responded "[y]ou think I care" when warned that his statements could result in criminal charges. The trial court did not plainly err in allowing the admission of the statements at trial.[1] And Lanoue's lawyer was therefore not ineffective for failing to move to suppress the statements at trial. *Fonville*, 291 Mich App at 384.

Lanoue next argues that he was denied a fair trial by the admission of other acts evidence, namely testimony by Kalanquin that he had previously written Lanoue misconduct tickets. We review this unpreserved issue for plain error. *Carines*, 460 Mich at 763.

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible for other purposes, such as to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b)(1). The list of proper purposes under MRE 404(b)(1) is nonexclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

Examining the remarks in context shows that the prosecution was not eliciting the testimony to establish that Lanoue acted in conformity with his character. Instead, the prosecution was attempting to establish that Kalanquin was familiar with Lanoue through his previous interactions and was therefore confident it was Lanoue's voice he heard during the assault. The testimony was thus relevant to a noncharacter purpose and was admissible *even if* it also reflected on his character. *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010).

[1] We acknowledge Morey's police report, which was attached to Lanoue's brief on appeal, but note that it is not part of the record. In any event, our review of that report provides further support for concluding that Lanoue's statements were voluntary. Specifically, Morey indicated that upon being advised of his *Miranda* rights, Lanoue signed the waiver form while simultaneously stating "I have the right to remain silent, bla bla bla. I know my rights; they've been read to me enough."

Further, the evidence was not unfairly prejudicial. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). Evidence is unfairly prejudicial "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). While evidence that Kalanquin had previously written Lanoue misconduct tickets was undoubtedly prejudicial to some extent, the comment was isolated and fairly innocuous. There was no danger that it was given "undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. There was no plain error.

Lanoue next argues that he was denied a fair trial when Morey offered his opinion that Lanoue was guilty. We review this unpreserved issue for plain error. *Carines*, 460 Mich at 763.

During Morey's direct examination, the prosecution asked whether he sent Wickwire's shirt to the lab for testing; Morey responded "no." When asked why, Morey responded "[t]he main reason is that exactly what the substance is does not matter from my standpoint. Technically it's an assault whether it's urine or some other substance. The chemical makeup of the substance does not matter to me." Morey further asserted that even if he had the juice bag, he would not have done any testing on it because Lanoue admitted having possession of it and because the makeup of the substance contained in the bag was "irrelevant in that it would be considered an assault regardless of what the substance was."

"[A] witness cannot express an opinion on the defendant's guilt or innocence of the charged offense" because such a question is "for the trier of fact." *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). In this case, however, Morey was not expressing his opinion about Lanoue's guilt. Rather, he was explaining his investigation and what he believed was important in order to rebut Lanoue's lawyer's suggestion that the investigation was deficient. See *Heft*, 299 Mich App at 83. Morey's testimony therefore did not deprive Lanoue of a fair trial.

Lanoue next argues that he was denied a fair trial by the prosecution's comments denigrating his lawyer during closing argument. We review the unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763. In order to show that prosecutorial error warrants relief, Lanoue must show that the prosecutor's remarks denied him a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). Such issues are decided on a case by case basis by examining the record and evaluating the remarks in context. *Id.*

Lanoue contends that the prosecution denigrated his lawyer by asserting that he was attempting to mislead the jury:

> I always love it when I see these defense attorneys get up here and do their closing arguments because they remind me of my son's favorite books that I read to him at bedtime. The Little Octopus is all about his life and how he floats through the ocean and anytime somebody gets too close to him he gets scared. Then that octopus sprays out the ink and tries to muddy the water to confuse everyone around him. That's what happens with these defense attorneys.

> We get up here and bring in all the evidence and anytime the defendant gets scared, they try to throw out stuff, try to throw out different arguments to muddy it and they call it reasonable doubt. There it is ladies and gentlemen, reasonable doubt. We don't have a urine bag here for the prop, so it's reasonable doubt that it didn't happen and you have to find him not guilty.
>
> That is not how it works ladies and gentlemen. . . .

While "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial . . . [they] may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Unger (On Remand)*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (citations omitted). Out of context, the prosecutor's remarks suggest that defense counsel was trying to distract the jury from the truth. "However, the prosecutor's comments must be considered in light of defense counsel's arguments." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). During his own closing argument, Lanoue's lawyer noted various alleged shortcomings in the investigation of the case—such as the failure to preserve and test the juice bag and the failure to test the shirt—as well as various claimed inconsistencies in witness testimony, and suggested that there was reasonable doubt about Lanoue's guilt. It was not improper for the prosecutor to respond by cautioning the jury to focus on the big picture and not allow defense counsel to cloud the issue or shift the focus away from the evidence of guilt. *Id*. at 592-593. In any event, an objection and request for a curative instruction could have alleviated any prejudice cased by the remarks. See *Dobek*, 274 Mich App at 67. There was no plain error.

Lanoue next argues that the trial court erred when it scored 20 points under OV 1 at Lanoue's sentencing. We review a trial court's factual determinations under the sentencing guidelines for clear error to determine if they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation," which we review de novo. *Id*.

OV 1 addresses "aggravated use of a weapon" and provides that 20 points may be scored where "[t]he victim was subjected or exposed to a harmful biological substance[.]" MCL 777.31(1)(b). The statute refers to MCL 750.200h for the definition of "harmful biological substance." MCL 777.31(3)(a). In turn, MCL 750.200h(g) provides that a "[h]armful biological substance" is "a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants." The trial court scored OV 1 after it found that Lanoue assaulted Wickwire with urine.

Lanoue first asserts that the prosecution did not prove that the substance contained in the juice bag was urine. We conclude that the trial court did not clearly err in finding that the substance was urine. Wickwire testified that he was hit with a "yellow substance," and Lanoue himself made several admissions it was urine. He even explained to Morey that he accomplished the assault by urinating into the juice bag before throwing it at Wickwire.

Lanoue also asserts that even if the substance was urine, it did not automatically qualify as a harmful biological substance absent evidence that he was infected with HIV, AIDS, or some other disease. The statute provides that the trial court must score 20 points if it finds that the

victim was "exposed to a harmful biological substance", MCL 777.31(1)(b), which means "a bacteria, virus, or other microorganism" that can be used to cause—among other things—disease in humans, MCL 750.200h(g); the statute does not require that the bacteria, virus, or other microorganism be particularly concentrated or virulent, but it must nevertheless be present. Urine can contain bacteria or other microorganisms that could cause disease in humans. See, e.g., *People v Guthrie*, 262 Mich App 416, 419-420; 686 NW2d 767 (2004). Thus, the trial court did not err when it found that the urine was "potentially [a] harmful biological substance." But there was no evidence that the urine at issue actually contained bacteria, viruses, or other microorganisms that can cause disease in humans. There was not even any testimony or evidence that urine *commonly* contains such bacteria, viruses, or microorganisms. Therefore, there was insufficient evidence to support a finding that the urine at issue was in fact a harmful biologic substance as defined under MCL 750.200h(g).

On appeal, the prosecution argues that, even if the trial court erred when it scored 20 points under OV 1, the urine-filled bag nevertheless constituted a weapon. Accordingly, the prosecution maintains, the trial court would have to score ten points under MCL 777.31(1)(d). Because the sentencing range is the same when OV 1 is scored at 10 points, Lanoue is not entitled to resentencing.

We decline to affirm Lanoue's sentence on this record. The trial court did not consider whether the urine-filled bag constituted a harmful biological device, see MCL 750.200h(f), did not consider whether it constituted a weapon under MCL 777.31(1)(d), and did not consider whether it was an imitation harmful substance or device under MCL 777.31(2)(d). Because the trial court is in the best position to resolve any dispute over the proper score under OV 1, we conclude that this case should be remanded for resentencing.

Lanoue next argues that the trial court engaged in judicial factfinding that increased his minimum sentence in violation of the Sixth Amendment, as interpreted by the Supreme Court's recent decision in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). We recently rejected this argument in *People v Herron*, 303 Mich App 392, 401-402; 845 NW2d 533 (2013), and we are bound by that holding. MCR 7.215(C)(2). Accordingly, this argument is without merit.

Finally, Lanoue argues that the trial court improperly relied on his lack of remorse in sentencing him. At sentencing, a trial court may not consider a defendant's refusal to admit guilt. *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003). However, the record in this case makes clear that the trial court was not considering Lanoue's refusal to admit guilt, but rather his lack of remorsefulness, which is appropriate. *Id.* at 650.

There were no errors warranting a new trial.

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra